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Honorable Dale E. Klein
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Subject: *Role of Advisory Committee on Nuclear Waste in Yucca Mountain
Licensing Proceeding*

Dear Chairman Klein:

I am writing to express concerns and ask important questions on behalf of the State of Nevada about the future role of the Commission's Advisory Committee on Nuclear Waste ("ACNW") in the Yucca Mountain licensing proceeding. COMSECY-04-0077, dated January 19, 2005, provides in relevant part that:

"Given the current status of the Yucca Mountain license application, the ACNW should continue its current activities in this area. But once the license application is received, any Committee activities related to the proposed high level waste repository should focus on information gathering and familiarization with the staff work plan and other documents to best position the Committee to assist the Commission in its license activities upon specific Commission request."

Nevada reads this to mean simply that, once DOE files its application for a construction authorization for the proposed Yucca Mountain high-level waste repository ("LA"), the ACNW would render advice on specific issues in the LA only upon specific Commission request. Nevada assumes any such ACNW advice would, as now, be included in public letters that reflect a collegial opinion, and that the ACNW would follow its customary practice of holding open meetings under the Federal Advisory Committee Act.

Under current NRC practice, the Commission cannot rely on advisory committee advice when it acts in an adjudicatory capacity to render decisions on matters in controversy in licensing hearings. This is because Commission adjudicatory decisions must be based on evidence in the record, NRC advisory committee members do not ordinarily testify at licensing hearings, and therefore NRC advisory committee letters are not ordinarily admitted into evidence at the hearing for the truth of their contents. Therefore, any ACNW advice on the LA would primarily benefit NRC Staff, which would consider it when asking questions of DOE and in writing its safety evaluation report.

However, Nevada learned recently from the ACNW staff that the Commission may instead be calling on the ACNW, or its individual members, to advise it in the performance of its adjudicatory functions after the LA is filed. Presumably this would include expert advice to the Commission on such matters as admission of contentions and the final adjudicatory decision. To our knowledge, no NRC advisory committee has ever been called upon to perform this kind of adjudicatory role. This possible role for the ACNW poses some serious concerns and questions about compliance with the law and a fair hearing process.

For one thing, the ACNW has reviewed relevant information and offered opinions on numerous safety issues that will be the subject of the hearing on the LA. *See, e.g.*, letters from the ACNW to the Commission dated June 9, 2006, June 8, 2006, December 9, 2005, October 27, 2005, October 27, 2005, September 29, 2005, and March 25, 2005. These letters often include findings on difficult, controversial, and very specific safety questions that constitute “adjudicative facts.” For example, in its June 9, 2006 letter, the ACNW advised the Commission that “the Committee finds the direction of fluvial redistribution modeling [for Yucca igneous events] generally acceptable.” These ACNW activities are extra-judicial; that is, they entail expert advice on the basis of information that is not admitted into evidence at the licensing hearing. This raises the question whether, under established principles of administrative law, the ACNW and its members and staff should be disqualified from assisting the Commission because of the appearance of prejudgment. *See, e.g., Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970); *Houston Lighting and Power Co. (South Texas Project, Units 1 and 2)*. CLI-82-9, 15 N.R.C. 1363 (1982).

The language of the COMSECY exacerbates this problem. By instructing the ACNW to “focus on information gathering and familiarization with the staff work plan and other documents” in preparation for its adjudicatory role, the COMSECY invites the ACNW to consider as much extra-record information as possible before the hearing begins. Even worse, the Commission has refused to apply its rules prohibiting off-the-record communications to adjudicatory decision-makers and advisors in the pre-licensing stage. This means that interested persons are now free to lobby ACNW members privately in the hope that their lobbying efforts will bear fruit later when the ACNW advises the Commission in an adjudicatory capacity.

This concern is grounded on the appearance of prejudice that arises from prior ACNW opinions based on extra-judicial public and private sources; it exists regardless of whether a particular member is able to put a prior ACNW letter completely aside and render fair and unbiased advice to the Commission based solely on the evidentiary record of the hearing. The test is not whether an ACNW member would act unfairly and use information outside of the hearing record or be reluctant to change a prior opinion, but whether, under the circumstances, a reasonably informed and interested member of the public might think this would occur.

With this concern in mind, Nevada would like answers to the following questions.

- (1) Can any assurances be given, and can any measures be put in place, to avoid both pre-judgment and the appearance of prejudice on the part of the ACNW and its members and staff?
- (2) After the ACNW's role changes, will it still function as an advisory committee under the Federal Advisory Committee Act and render collegial advice to the Commission?
- (3) After the ACNW's role changes, will its meetings on LA issues and its adjudicatory advice to the Commission be secret?
- (4) Will the Commission's rules on *ex-parte* communications and separation of functions (10 C.F.R. §§ 2.347 and 2.348) apply to the ACNW and its members and staff, and if so, when?
- (5) Will the change in the ACNW's role take effect when (and if) the LA is submitted for completeness review, or when the LA is accepted for formal docketing and the notice of hearing is issued?
- (6) Will the ACNW and its members and staff be considered immune from discovery and testimonial subpoenas in the licensing proceeding? In this regard, will a distinction be made between opinions and advice rendered before the change in role to adjudicatory advisor and opinions and advice rendered afterwards?
- (7) Will the ACNW and its members be appointed as "adjudicatory employees" and written notice be given of this appointment under 10 C.F.R. § 2.4, and if so, when?
- (8) With the ACNW's name being changed to the Advisory Committee on Nuclear Waste and Materials ("ACNW&M"), will there be a new charter written for the Committee that will resolve some of the concerns about the Committee's role raised in this letter?

In asking these questions, Nevada intends no disrespect to the ACNW and its members and staff. Nevada recognizes that the Commission will need expert

adjudicatory advice to assist it in reviewing the pleadings and evidentiary record
However, given the importance of this matter, and the wide public interest in the LA,
Nevada believes any adjudicatory proceeding on the LA must be attended not only by
every element of fairness, but also by every appearance of fairness.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert R. Loux". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Robert R. Loux
Executive Director

RRL/cs

cc Nevada congressional delegation